FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 10 1992
OFFICE OF THE CLERK

No. 91-5118

In The

Supreme Court of the United States

October Term, 1991

DERRICK MORGAN,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

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ARGUMENT

A.

GENERAL FAIRNESS QUESTIONS ARE NO SUBSTITUTE FOR INQUIRY INTO WHETHER AN INDIVIDUAL WILL AUTOMATICALLY IMPOSE DEATH, AND A DEFENDANT'S INTEREST IN SELECTING JURORS ABLE TO CONSIDER MITIGATION JUSTIFIES A MINIMAL INTRUSION INTO THE DISCRETION OF TRIAL COURTS.

The state asserts that only racial bias is sufficiently important to warrant a Sixth Amendment requirement of inquiry during voir dire. The ability to find that a sentence other than death is appropriate is central to a capital sentencing jury's function, and merits the same protection as a defendant's right to uncover racial bias among veniremembers. Faced with a weak case, even a racist might acquit; a juror who would automatically impose death will never afford a defendant leniency, no matter how compelling the case for leniency is. The difference is that a racist is influenced by his views while serving as a juror, whereas the opinion at issue here is more than influential, it determines the ultimate issue before a sentencing juror.

This trial demonstrates the failings of discretion. The trial court refused to ask whether individuals would automatically impose death if they convicted petitioner. The court explained that "I have asked the question in a different vain (sic) substantially in that nature." (J.A. 44) It had not.

The state concedes that only nine of the twelve jurors were even asked whether they could follow the law. (Respondent's brief at p. 4) When juror Ship said that he

would not vote against the death penalty, no clarifying questions were asked even though that response might have indicated that he had misunderstood the question. A general fairness question elicited from venireman Dexter the response that he would want to see a guilty defendant hung, a response the state recognizes was ambiguous because it could have referred to petitioner or only to the individual who had murdered Dexter's friend's parents. (Respondent's brief at 11) Yet the trial court, exercising its discretion, asked no questions to clarify that response, though Dexter would seemingly have been a fit juror had he meant the latter.

The state would rely upon a trial court's discretion because it believes trial judges may be aware of prevailing community beliefs. (Respondent's brief at 25) Trial judges can share prevailing community beliefs that they may not recognize as being prejudicial. This trial court referred to petitioner's African American attorneys as "Smiley" and "Laughing Boy." (R. 1729) Regardless, community mores are not the problem. An individual's viewpoint is at issue, and taking an oath to uphold the Constitution does not improve a judge's ability to guess whether an individual will automatically impose death.

Requiring this question will have little impact on a trial court's discretion. The question need be asked only when requested by the defendant. Life qualifying a venireman will usually involve just one question. It is no more intrusive than *Witherspooning* a venire, yet respondent's concern for discretion and state's rights has not prompted it to question that procedure.

B.

DUE PROCESS CONCEPTS OF FAIRNESS REQUIRE THAT A DEFENDANT BE ABLE TO LIFE QUALIFY A VENIRE WHENEVER THE STATE DEATH QUALIFIES A VENIRE, REGARDLESS OF WHETHER THE STATE HAS A RIGHT TO DEATH QUALIFY A VENIRE.

Respondent argues that *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), conferred no right upon the states. That allegation constitutes an abrupt departure from respondent's position in *Daley v. Hett*, 113 Ill.2d 75, 495 N.E.2d 513 (1986), where respondent vehemently argued that it had a right to death qualify jurors who would not even be involved in a capital sentencing decision.

Even though petitioner does not believe that *Witherspoon* conferred a right upon the state, there is support for the respondent's claim in *Daley v. Hett* that it did:

> McCree concedes that the State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. Ipso facto, the State must be given the opportunity to identify such prospective jurors by questioning them at voir dire about their views of the death penalty.
>
> *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 146, n.7, 106 S.Ct. 1758 (1986).

If the state does have the right to identify those individuals, due process guarantees defendants the reverse. Even if the state has no right to identify those individuals, due process requires that the defendant be allowed

to ask the reciprocal question when a trial court exercises its discretion and allows the state to death qualify a jury.

Respondent incorrectly claims that there is scant room for bias to affect sentences imposed under current death sentencing schemes. Even if Illinois' Death Penalty Act reduces discretion to a constitutionally acceptable level, a fair jury is still required to properly exercise the substantial discretion that remains vested in the sentencer. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 35, 36, 106 S.Ct. 1683 (1986). "Each jury is unique in composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *McCleskey v. Kemp*, 481 U.S. 279, 95 L.Ed.2d 262, 279-280, 107 S.Ct. 1756 (1987).

There is little logic in the assertion that a juror who automatically would impose death is unimportant because he would not affect the sentence unless he convinced eleven other jurors to impose death. (Respondent's brief at 27) If the state's argument is applied to another circumstance, race, its absurdity shows. No one would seriously contend that a racist could serve on a jury merely because he would be only one of twelve votes needed to convict an African American defendant.

The argument that the state has a more important interest in *Witherspooning* veniremen than the defense has in asking the reverse is misguided. (Respondent's brief at 27) The legislature's decision that any individual juror can prevent a death sentence in no way lessens a defendant's interest in being tried by a fair jury. That decision

reflects the legislature's considered opinion that a death sentence should be difficult to obtain. If one person who cannot consider mitigation serves on a capital sentencing jury, the legislature's sentencing scheme is thwarted, for it is not possible for each member of that jury to prevent a death sentence.

C.

RESPONDENT'S ASSERTION THAT THERE IS NO CONSENSUS OF JUDICIAL DECISIONS SUPPORTING PETITIONER IS MISTAKEN.

Initially, the state notes that most states with a death penalty have not considered the issue. This Court has pointedly stated that a consensus need exist only in those jurisdictions having considered an issue. *Mu'Min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 493, 509, 111 S.Ct. ___ (1991) (rejecting American Bar Association jury selection standards because they have "not commended themselves to a majority of the courts that have considered the question").

The state lists a number of cases to establish that there is no consensus. The state's cases are inapposite with the exception of those from South Carolina and Delaware, jurisdictions which petitioner noted in his original brief supported respondent's position.

The state makes much of *Henderson v. State*, 583 So.2d 276, 283-284 (Ala. Crim. App. 1990), *aff'd, Ex Parte Henderson*, 583 So.2d 305 (Ala. 1991), even claiming that it overruled *Bracewell v. State*, 506 So.2d 354 (Ala. Crim. App. 1986), which plainly said a defendant is entitled to ask

whether jurors would automatically impose death. *Henderson* merely held that the issue was procedurally defaulted and did not amount to plain error. *Henderson v. State*, 583 So.2d at 283-284. *Henderson* established no substantive rule on this issue and did not overrule *Bracewell*.

The state relies upon *Irving v. State*, 498 So.2d 305 (Miss. 1986), for the proposition that the trial court should have the discretion to refuse to question jurors on this subject. *Irving* actually held that the reverse-Witherspoon question should have been asked, but that the issue had been defaulted. *Irving v. State*, 498 So.2d at 311.

In *State v. Rogers*, 341 S.E.2d 713, 722 (N.C. 1986); *overruled on other grounds, State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988), the court did say that a trial court has broad discretion in conducting voir dire, but concluded that "both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial jury." *State v. Rogers*, 341 S.E.2d at 722. That case is consistent with petitioner's position.

King v. Strickland, 714 F.2d 1481, 1495 (11th Cir. 1983), does not support respondent. *King* did not hold that reverse-*Witherspooning* is improper, but that counsel was not entitled to ask a hypothetical question that did not reflect the nature of the death penalty statute. *King v. Strickland*, 714 F.2d at 1495. No misleading hypothetical is here involved.

Respondent misunderstands petitioner's position concerning *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), and *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990). Far from saying that they require reverse-*Witherspooning*,

petitioner noted only that it was obvious that the trial courts in those cases allowed reverse-*Witherspooning* despite South Carolina's rule that such questioning is not necessary.

State v. McMillin, 783 S.W.2d 82 (Mo. 1990), also supports petitioner's position. That court held that refusing to ask a reverse-*Witherspoon* question was permissible, but only because other questions had revealed that information. *McMillin* succinctly explained why *Witherspooning* is allowed, and in so doing, revealed why reverse-*Witherspooning* is necessary. The court stated that death-qualifying is permitted to facilitate a determination of whether veniremen can consider the full range of punishments. *State v. McMillin*, 783 S.W.2d at 94. Reverse-*Witherspooning* serves exactly that purpose, and only when it is employed can it be determined whether veniremen can consider the full range of punishments. When only *Witherspooning* is allowed, all that can be determined is whether veniremen can consider the maximum punishment.

Commonwealth v. White, 531 A.2d 806 (Pa. Super. 1987), also supports petitioner's position, even though it was not a capital case. In *White*, the court specifically stated that *voir dire* questions concerning potential penalties were appropriate in first degree murder cases. *Commonwealth v. White*, 531 A.2d at 809. The court explained that the rule would be of particular benefit to capital defendants, who could use it to identify veniremen who would automatically impose death upon conviction. *Commonwealth v. White*, 531 A.2d at 809 n.1.

D.

THE POSSIBILITY THAT THERE ARE JURORS WHO WILL AUTOMATICALLY IMPOSE DEATH IS SUFFICIENTLY REAL TO REQUIRE VOIR DIRE INQUIRY WHEN REQUESTED BY THE DEFENDANT.

Respondent does not claim that there are no automatic death penalty jurors. All studies cited by the petitioner and respondent demonstrate the existence of such jurors.

The NACDL cited recent studies which found the incidence of automatic death penalty jurors to be between 10% and 28.6%. Two of those studies demonstrated that such individuals may not be discovered by their responses to general fairness questions, a finding that the state has ignored. The state contends that this Court should disregard the studies because of the "markedly inconsistent" results obtained. (Respondent's brief at 13) The support for that assertion is a 1981 Harris Poll and two articles written by Joseph Kadane, both of which relied on that poll. Because of the age of the Harris Poll, it does not reflect the growing number of people who now favor the death penalty. The more recent studies cited by petitioner and the NACDL which found a higher incidence of potential automatic death penalty jurors do reflect this change in attitude and represent a more accurate estimation of prevailing views.

Petitioner and other capital defendants should not be subject to the whims of the general population on this issue. All of the studies, old and new, establish the existence of these individuals at levels sufficient to present a

danger of their appearance on a capital jury with the consequent prejudice to the defendant.

The state's remaining criticisms will be briefly discussed. First, the prosecutions's criticism of the methodology of the studies where researchers did not direct their questions exclusively to sworn jurors rings hollow in light of the state's reliance on a Harris Poll. Moreover, as the state admits, the Nietzel Study, which found that 25.8% of potential jurors would automatically impose death, did in fact examine sworn jurors who had deliberated in actual capital cases. Second, the state provides no evidence that the supposed regional bias of the studies taints the results. The Harris Poll, which the state cites with approval, found no regional differences in general attitudes toward the death penalty. Kadane, Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure, 78 *J. AM. STAT. ASS'N* 544, 549 (1983). Third, while the studies did not exclusively focus on the number of automatic death penalty jurors in jury populations, such an assessment was a necessary factor, and thus a key element of each study's findings. Lastly, the state claims, without explanation, that author bias against the death penalty influenced the results. (Respondent's brief at 13) In so arguing, the state fails to address how such a bias could affect purely mathematical results such as what percentage of the population responded in a particular manner, why respected researchers and authoritative sociological journals would significantly shape results for personal motives, or why potential biases of the Harris Poll and related studies do not require this Court to disregard their results. The state's conclusory and unsupported arguments miss the critical point of all of the

studies – there exist potential jurors who will automatically impose death.

The state also suggests that this Court cannot consider the findings of the studies presented by the NACDL because they were not included in the record. This Court has frequently considered studies presented by amicus curiae. *See, e.g., Stewart v. Abend*, 495 U.S. ___, 109 L.Ed.2d 184, 110 S.Ct. 1750, 1763 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 616, 97 L.Ed.2d 485, 107 S.Ct. 3008 (1987). In fact, Rule 37 of the Supreme Court Rules specifically recognizes that "(a)n amicus curiae brief which brings relevant matter to the attention of the Court *that has not already been brought to its attention by the parties* is of considerable help to the Court." (emphasis added) Neither *Ciucci v. Illinois*, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958), nor *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954), cited by the state, even consider the issue.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that petitioner receive a new sentencing hearing.

Respectfully submitted,

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